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No. 00-365

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLOTTE AHEART,

Petitioner,

v.

SODEXHO MARRIOTT SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals properly entered summary judgment against Petitioner Charlotte Aheart's Title VII sexual harassment claim because her employer, Respondent Sodexho Marriott Services, Inc., satisfied the affirmative defense articulated by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) where it is undisputed that:

- Respondent exercised reasonable care to prevent and promptly correct harassing behavior by distributing to its employees (including Petitioner) a comprehensive anti-sexual harassment policy and by conducting a prompt and thorough investigation that resulted in the termination of the harasser (Leo Thompson) once Petitioner complained to human resources.

- Petitioner unreasonably failed to invoke Respondent's sexual harassment policy since she did not report Thompson's harassment for well over a year after he became a supervisor and began to harass her.

CORPORATE DISCLOSURE STATEMENT

Respondent Sodexho Marriott Services, Inc. is a publicly held company and does not have any parent corporations. Sodexho Alliance, S.A., is a publicly held company that owns 10% or more of the stock of Respondent.

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Statute:

42 U.S.C. § 2000e *et seq.* 1

STATEMENT OF THE CASE

The Petitioner does not challenge the legal framework that resulted in the entry of summary judgment against her sexual harassment claim, nor does she contend that the Court should review this case in order to resolve a split among the lower courts. Instead, she wants the Court to delve into the facts and apply them to the *Faragher/Ellerth* affirmative defense. The Court should decline her invitation to review this "fact-bound" determination.

A. The Proceedings Below

Petitioner Charlotte Aheart worked for Respondent Sodexho Marriott Services, Inc. (herein "the Company") as a security guard. In July 1996, Petitioner reported to the Company's human resources department that she had been sexually harassed by Leo Thompson, a low-level supervisor. The Company immediately investigated her allegations, found some to be substantiated, and terminated Thompson. Even though the Company promptly discharged Thompson for his misconduct, Petitioner filed this lawsuit alleging that the Company was liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

The Honorable Peter J. Messitte of the United States District Court for the District of Maryland ruled that the Company was absolved from liability under Title VII because, based on Petitioner's own deposition testimony, it fulfilled the affirmative defense articulated by this Court in *Faragher* and *Ellerth*. A panel of the United States Court of Appeals for the Fourth Circuit unanimously affirmed in an unpublished *per curiam* opinion, and the Fourth Circuit declined *en banc* review of that decision. This Petition followed.

Because the Equal Employment Opportunity Commission, the District Court and the Fourth Circuit all rejected her sexual harassment claim, the Petitioner resorts to a distortion of the record in her instant Petition. Her most pervasive gimmick is to contradict her sworn deposition testimony. Most notable in this respect is Petitioner's assertion that she "repeatedly" complained to her supervisors about Thompson harassment from May 1995 to June 1996. Pet., pp. 3, 12. This directly contradicts her deposition testimony that, after Thompson became a supervisor in April 1995, she did not complain about him until June 1996. *See* Joint Appendix in the Fourth Circuit (herein "JA") at 108-12. In fact, based on that testimony, Petitioner's attorney declared at the summary judgment hearing:

> THE COURT: [W]hat happened in October of '94? Is that the meeting where [Donald Galloway] put them apart?
>
> MR. STEELE: Allegedly, yes.
>
> THE COURT: She didn't do anything beyond that. When did she complain again?
>
> MR. STEELE: June of '96.

Id. at 545.

Petitioner's transparent attempt to grab this Court's attention with patently erroneous "facts" punctuates the infirmity of her Petition. The lower courts correctly found that the Company satisfied the first prong of the affirmative

defense — that it exercised reasonable care to prevent and promptly correct harassing behavior — because it distributed to Petitioner its comprehensive policy prohibiting sexual harassment, and when Petitioner reported Thompson to human resources, it investigated her allegations and terminated him.

The lower courts also correctly ruled that the Company satisfied the second prong of the affirmative defense because Petitioner "unreasonably failed to take advantage" of the Company's harassment policy and failed "to avoid harm otherwise" because she failed to report Thompson during the fourteen month period he harassed her while a supervisor. The facts that amplified Petitioner's unreasonable failure to complain for more than a year included her awareness that the Company prohibits sexual harassment and encourages complaints, and her admission that she knew Thompson's actions violated this policy. Petitioner's inexcusable delay in reporting Thompson sooner is underscored by her admission that, before Thompson ever harassed her, she reported to human resources that a co-worker had sexually harassed her which resulted in an immediate investigation and cessation of the harassment. Moreover, Petitioner saw human resources personnel "every day" and regularly complained to management and human resources about the way Thompson handled personnel matters, but she never reported that he was sexually harassing her.

Trying to divert attention from her unreasonable delay in reporting Thompson, Petitioner postulated that the Company should have terminated Thompson in late June 1996 (fourteen months after he began to harass her), when she told two first level supervisors and the director of security that Thompson had harassed her. She conveniently

omits that she asked these supervisors to keep her complaint confidential. They honored Petitioner's request for confidentiality, but the director of security instructed Petitioner to tell Thompson that she has complained and that if Thompson engaged in any further inappropriate conduct, he will take action against him. About a month later, Thompson made an untoward comment to Petitioner, and she lodged a non-confidential complaint to human resources. This resulted in Thompson's termination.

Against this backdrop the district court cogently observed "I think this woman could have stopped the harassment a long time ago, and she didn't." *See* JA at 555. The district court ruled that it was unreasonable for Petitioner not to complain for more than a year, as punctuated by the fact that the Company terminated Thompson promptly after she made her non-confidential complaint to human resources in July 1996. *Id.* at 551-54.

B. Statement Of Facts

In this Title VII case, Petitioner alleges that Leo Thompson sexually harassed her once in October 1994 (when he was a co-worker) and then after he became a supervisor in April 1995. Petitioner concedes, as she must, that when she finally reported Thompson to the Company's human resources department, he was fired. Pet., p. 5.

Petitioner specifically claims that in October 1994, she reported to Donald Galloway, a shift supervisor, that Thompson (then a non-supervisory co-worker) had grabbed her breasts. Petitioner erroneously asserts that Galloway did not take "any steps" in response to her

complaint. Pet., pp. 3-4. Petitioner's assertion that the Company ignored her complaint is belied by her testimony:

> Q. During this meeting, did Mr. Galloway indicate whether or not he was going to take any action against Mr. Thompson, notwithstanding your statement that you didn't want anything done to him?
>
> A. He didn't state it, but he took action.
>
> Q. What action did Mr. Galloway take against Mr. Thompson?
>
> A. Well, he kept us apart. That's the action he took. It wasn't against — I don't know if he did anything, or if he gave counseling, or whatever. I don't know, as far as that part. But I know that the action that he took was, you know, on my behalf, that, you know, something had to be done for it to be stopped. And I told him I wanted something to be done, and he made sure we weren't together, you know, didn't work the post together like we were when this happened.
>
> Q. Did he meet with you pretty quick after you complained to him about this incident?
>
> A. Yes.

See JA at 92-93. Galloway's response to Petitioner's report was effective since she admitted at her deposition that there were no further incidents or complaints over the next six months Galloway supervised her. *Id.* at 95-96.

In April 1995, Thompson was promoted to shift supervisor. Petitioner asserts that after this promotion, Thompson subjected her to a litany of sexually offensive remarks and touchings until July 1996, over a year later, when she reported him to human resources and he was discharged.

Prior to June 1996, however, Petitioner never reported Thompson's actions to any supervisor or to anyone in human resources. She also admitted that no one in a supervisory capacity ever witnessed Thompson sexually harass her during this period. The only incident ever witnessed by a supervisor occurred in late June 1996 (shortly before Thompson's discharge) when Thompson made a sexually inappropriate comment to Petitioner in front of Leroy Blagmon, a shift supervisor. Blagmon removed Petitioner from the situation and told her that he was going to report the matter to Robert Brown, the director of security. Petitioner, however, asked him to keep the matter confidential, which he did. *See* JA at 100-03, 261-62.

A few days later, Petitioner told Galloway that Thompson made an inappropriate remark to her, but asked that he keep it confidential. Galloway told Petitioner that if she did not report the matter to Brown, he would. Although Petitioner informed Brown that Thompson had harassed her, she annulled her complaint by insisting that he keep it confidential. Brown, however, told Petitioner that he would respect her request for confidentiality for the time being, but she must tell Thompson that she has reported the matter, that his conduct must stop, and that he cannot keep her complaint confidential if Thompson engaged in any further misconduct. Petitioner agreed to this. *See* JA at 108-09, 116-18.

For the next month Thompson did not engage in any inappropriate behavior. Then, on July 23, 1996, Thompson made an inappropriate sexual remark to Petitioner. The next week, Petitioner made a report to human resources without a request for confidentiality which resulted in an investigation and Thompson's termination. Petitioner admitted that the investigation which resulted in Thompson's termination was "prompt and thorough" and adequate in every respect. *See* JA at 78-86.

REASONS FOR DENYING THE WRIT

A. The Petitioner Asks The Court To Make Factual Findings Regarding The Applicability Of The *Faragher/Ellerth* Affirmative Defense.

This Petition does not raise any unresolved or conflicting legal principles in the context of Title VII sexual harassment litigation. Instead, the issue raised in this Petition requires an examination of the factual predicate regarding the Company's establishment of the *Faragher/Ellerth* affirmative defense. The lower courts determined that, based on Petitioner's own deposition testimony, the Company established that defense. In her Petition to this Court, the Petitioner merely argues that the district court and the Fourth Circuit "misapplied" the facts to the law. To support her "misapplication of the facts" theory, the Petitioner contradicts her sworn deposition testimony and glosses over inconvenient truths. In short, Petitioner would have this Court turn a blind eye to the admissions she made that establish the *Faragher/Ellerth* affirmative defense. Her Petition, accordingly, should be denied.

In *Faragher* and *Ellerth* this Court announced that, although an employer "is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor," in circumstances when "no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . ." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2292-93; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270. This affirmative defense has two components. An employer is not liable if it demonstrates that it "(a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270.[1]

The lower courts correctly held that the Company satisfied the first element of the affirmative defense because Petitioner admitted that she received the Company's comprehensive policy that prohibits sexual harassment and sets forth a complaint procedure which allows employees to go above the harassing employee. *See* JA at 36-38, 211. Petitioner does not and cannot challenge this.

Petitioner's testimony also established that the Company "promptly corrected" the behavior about which she complains. Over a year after Thompson became a supervisor and began to harass her, Petitioner finally complained to

1. This defense is not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* Petitioner does not contend that she was subjected to any such tangible employment action.

human resources, which immediately investigated her allegations, found them to be sufficiently substantiated, and fired Thompson. Petitioner admitted that the Company's response to her complaint was adequate in every respect. *See* JA at 85-86. Petitioner's suggestion that the Company did not take "any action" in response to her complaint is simply wrong. Pet., p. 11.

The lower courts also correctly concluded that the Company fulfilled the second element of the affirmative defense. By failing to report Thompson for well over a year, Petitioner "failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Faragher*, 524 U.S. at 805, 118 S. Ct. at 2292.

In this connection, Petitioner contends that Thompson began sexually harassing her shortly after he became her supervisor in April 1995. Petitioner, however, admitted that she did not complain to anyone in a supervisory capacity until late June 1996 — over a year after this harassment began — when she first made her confidential complaint. While she asserts in her Petition that she complained "repeatedly" from May 1995 to June 1996, Pet., p. 12, this contradicts her deposition testimony, as her lawyer readily acknowledged at the summary judgment hearing:

> THE COURT: [W]hat happened in October of '94? Is that the meeting where [Mr. Galloway] put them apart?
>
> MR. STEELE: Allegedly, yes.

THE COURT: She didn't do anything beyond that. When did she complain again?

MR. STEELE: June of '96.

See JA at 545.

A panoply of other undisputed facts demonstrated that Petitioner did not fulfill her duty to avoid or minimize damages since she failed to complain for so long. Petitioner *knew* from the outset that management and human resources were available to remedy harassment because, in 1993, she complained that another employee (Walter During) had sexually harassed her which resulted in an immediate investigation and cessation of the harassment. *See* JA at 66-68.

Petitioner testified that she saw Dolores Coe from the Company's human resources department "every day," but decided to keep Thompson's actions a secret. *See* JA at 69. Likewise, Petitioner had meetings with Joan Muzzillo in human resources and John Gamble, the head of security, to discuss attendance issues. Although Thompson supposedly was sexually harassing her at these times, she inexplicably did not report him during these meetings. *Id.* at 55-56, 60-61, 69-71.

Petitioner also complained repeatedly to Thompson's supervisors about the way Thompson handled various personnel matters, but she *never* reported any sexual harassment by Thompson even though *he* was the subject of the meetings. *See* JA at 124-28, 130-36. Petitioner also admitted that she *knew* the Company prohibited sexual

harassment and *knew* that she was being sexually harassed in violation of the Company's policy *at the time* Thompson engaged in the inappropriate conduct. *Id.* at 129.

Although Petitioner conceded that she did not make a non-confidential complaint about Thompson until late July 1996 and that he was fired as a result of her complaint, she asserts that the Company should have responded in late June when she made confidential complaints about Thompson to first level supervisors Blagmon and Galloway and to Brown. Petitioner clearly did not fulfill her duty "to avoid or minimize" harm when she complained to her supervisors about Thompson in one breath, but urged them to keep her complaint confidential in the next. *Faragher*, 524 U.S. at 806, 118 S. Ct. at 2292 (citation omitted). *See also Torres v. Pisano*, 116 F.3d 625 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997) ("[I]t must be said as a matter of law that [the supervisor] behaved reasonably in honoring [plaintiff's] request for confidentiality and in failing to act immediately to end the harassment."); *Bishop v. Nat'l Railroad Passenger Corp.*, 66 F. Supp.2d 650, 668 (E.D. Pa. 1999) (Second prong of affirmative defense met where "each other time that a Plaintiff complained to somebody . . . Plaintiff specifically requested that nobody else be told.")

Petitioner disingenuously suggests that the Company's decision to issue Galloway and Blagmon disciplinary warnings for their decisions to respect Petitioner's request for confidentiality concerning Thompson's actions warrants reversal. Pet., pp. 5-6, 14-15. Petitioner forgets that the written warnings do not negate her request for confidentiality, but evidence the Company's high standards for preventing workplace harassment that exceed what Title VII requires.

Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999) (holding that even though plaintiff reported the harassment to a supervisor, her failure to take his advice and "contact an EEO counselor" was not reasonable, even though the supervisor violated an employer directive that all sexual harassment, even those a victim does not want to pursue, must be reported to human resources); *Dennis v. County of Fairfax*, 55 F.3d 151, 154 (4th Cir. 1995) (rejecting plaintiff's argument that employer's "corrective action" following his internal complaint "amounts to a concession that discrimination actually took place" because to do so would encourage employers not to investigate complaints of discrimination).

Petitioner also erroneously asserts that Blagmon witnessed Thompson sexually harass her prior to June 1996 (when she made her confidential complaint), but took no action. Pet., pp. 4, 9. Petitioner again conveniently fails to acknowledge her testimony that she did not complain about this and that the "harassment" Blagmon supposedly witnessed was Thompson's remark that he wanted to "mess up" her hair and joking inquiry about whether he and Blagmon could double date Petitioner and her mother. *See* JA at 103-08. Although these remarks do not rise to the level of a Title VII violation, Petitioner forgets that she did not complain about these remarks and that Blagmon, as a first level supervisor, was not a "high-echelon official" whose knowledge was imputed to the Company in the absence of any complaint by Petitioner. *Faragher*, 524 U.S. at 789, 118 S. Ct. at 2284 (collecting "myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop.") (citations omitted).

B. The Rulings Of The Lower Courts In This Case Fully Comply With This Court's Holdings In *Faragher* And *Ellerth*.

Petitioner not only misstates the facts in this case, she misstates the lower courts' holdings in hopes of creating an issue worthy of writ consideration. Their rulings in no way jeopardize this Court's holdings in *Faragher* and *Ellerth*; the purported conflict raised by Petitioner does not exist, and review by this Court is unnecessary. Indeed, contrary to Petitioner's suggestion (Pet., pp. 15-18), the lower courts' unpublished decisions in this case are in total harmony with precedent from other courts of appeal. *Scrivner v. Socorro Ind. School Dist.*, 169 F.3d 969, 971 (5th Cir. 1999) (summary judgment affirmed where plaintiff did not report supervisory sexual harassment for over eight months, even though she had numerous audiences with human resources, and the supervisor was removed when she finally made a formal complaint); *Garrison v. Burke*, 165 F.3d 565, 571 (7th Cir. 1999) ("[E]ven if [supervisor's actions] *did* rise to the level of sexual harassment, [plaintiff] usually did not report to her superiors that she was uneasy about seeing [him]. The City authorities certainly cannot be held responsible for a failure to act, when [plaintiff] chose not to inform the City about her concerns.") (emphasis in original) (citation omitted); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) (No employer liability for sexual harassment where plaintiff had previously complained to members of human resources about personal and personnel problems, but "did not report any incidents that they considered to be sexual harassment.") (footnote omitted); *see also Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir.), *pet. for cert. filed*, 69 U.S.L.W. 3087 (July 12, 2000) (holding that the second prong of the

affirmative defense was satisfied where "plaintiffs failed to reasonably utilize the complaint procedure provided by the [employer's] open-door policy" because, even though they complained to mid-level managers, the policy requires that "if a problem is not resolved, the employee should go to the next highest level of management, to the top level if necessary," and when top management learned of the harassment, the harasser was discharged.)

Moreover, contrary to Petitioner's suggestion, the lower courts did not conclude that the Company failed to satisfy the affirmative defense. Pet., p. 13. By extracting portions of the district court's ruling out of context, Petitioner erroneously asserts that the district court found that her supervisors "failed to do their job" and that, accordingly, it "essentially" found that the Company could not establish the first prong of the affirmative defense. Pet., p. 13. Petitioner's manipulation of the record is revealing and ignores the fact that her supervisors were respecting her request for confidentiality. Petitioner also forgets that, shortly after she made these confidential complaints, she lodged a non-confidential complaint to human resources that resulted in Thompson's termination.

Petitioner concludes that the district court and the Fourth Circuit "thumbed their noses" at this Court by concocting an "Alice in Wonderland" decision Pet., p. 12. Notwithstanding Petitioner's characterization of the lower courts' actions, they properly held that Petitioner utterly failed to raise an issue of fact concerning her sexual harassment allegations. They ruled, purely and simply, that the *Faragher/Ellerth* affirmative defense was satisfied in this case. This is not, as Petitioner suggests, an aberration or travesty that will send sexual harassment law into a tailspin.

Rather, it resulted from the proper application of the affirmative defense based on a full and fair consideration of the facts as recited by Petitioner at her deposition. This case raises no significant issue of sexual harassment law that warrants this Court's review.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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